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IN THE SUPREME COURT OF THE STATE OF IDAHO

JERED JOSIAH WILSON,)	
)	
Petitioner-Appellant,)	NO. 43200
)	
v.)	GEM COUNTY NO. CV 2014-622
)	
STATE OF IDAHO,)	REPLY BRIEF
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF GEM**

HONORABLE CHRIS S. NYE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jered Josiah Wilson appeals from the district court's Judgment summarily dismissing his Petition for Post-Conviction Relief. On appeal, Mr. Wilson contends that the district court erred in summarily dismissing the petition in its entirety because, with regard to four of Mr. Wilson's claims, the evidence was sufficient to raise genuine issues of material fact as to whether counsel was ineffective for agreeing to join two unrelated cases for trial and for failing to call witnesses and put on evidence which would have cast doubt on the State's case and the truthfulness of its witnesses. The Petition was dismissed despite the fact that the district court found trial counsel's strategy to join two unrelated cases for trial was based on ignorance, and despite the affidavits of four potential witnesses which set forth relevant and admissible information helpful to the defense, and to which they would have testified had they been called at trial.

Two underlying criminal cases, in which Mr. Wilson had been charged with two counts related to his sex offender registration and two counts of lewd conduct, had been consolidated for trial. One incident of lewd conduct was alleged to have occurred in a car while Mr. Wilson was driving from Twin Falls to Emmett, Idaho, and one incident of lewd conduct purportedly occurred in Mr. Wilson's house in Emmett. Mr. Wilson submitted affidavits showing one available witness would have testified that Mr. Wilson was not living at the house in Emmett during the relevant time period and one witness would have testified that he was usually in the car with Mr. Wilson when he drove to Twin Falls. Further, Mr. Wilson submitted affidavits and evidence to demonstrate counsel's ineffectiveness in failing to call any witnesses or introduce any evidence

which was available and which would have cast further doubt on the victim's credibility and/or shown the events as the State's witnesses described them were improbable. Therefore, the district court erred by failing to hold an evidentiary hearing on these four claims.

This Reply Brief is necessary to address the State's erroneous assertions and conclusions made in its Respondent's Brief.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Wilson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err in summarily dismissing Mr. Wilson's Petition for Post-Conviction Relief?

ARGUMENT

The District Court Erred In Summarily Dismissing Mr. Wilson's Petition For Post-Conviction Relief

In analyzing whether summary dismissal of a post-conviction claim is appropriate, “[a] court is required to accept the petitioner’s un rebutted allegations as true” *Baldwin v. State*, 145 Idaho 148, 153 (2008); *Saykhamchone v. State*, 127 Idaho 319, 321 (1995). Thus, if a petitioner alleges facts in his verified pleading and affidavit which, viewed as though they were true, would show deficient performance and prejudice, then the court may not summarily dismiss a claim.

The standard for establishing a genuine issue of material fact is lower than the standard applied to a claim at an ensuing evidentiary hearing. See *Storm v. State*, 112 Idaho 718, 720 (1987) (recognizing a difference between the standards used in an evidentiary hearing versus a summary dismissal proceeding). At the evidentiary hearing, the petitioner is “required to prove his claim of ineffective assistance of counsel by a preponderance of the evidence.” *Loveland v. State*, 141 Idaho 933, 936 (Ct. App. 2005) (explaining this standard in the context of the differing standards between the evidentiary hearing and the summary dismissal proceedings); *cf. Stuart v. State*, 118 Idaho 865, 869 (1990) (recognizing this as the standard for post-conviction cases generally). On the other hand, the proper standard for summary disposition proceedings, as the Idaho Supreme Court has explained, is based on a consideration of the alleged facts’ “relationship to the legal theories presented by the parties,” meaning a fact has some logical connection to the consequential facts under that legal theory. *State v. Yakovac*, 145 Idaho 437, 444 (2008) (internal quotation omitted). “If such a factual issue is presented, an evidentiary hearing must be conducted.” *Id.*

Mr. Wilson established the existence of issues of material fact as to his assertions that his trial counsel was ineffective for agreeing to join his two cases based on the erroneous belief that this strategy would prohibit the State from adding a sentencing enhancement.¹ Mr. Wilson also asserted that trial counsel failed to call several witnesses whose testimony would have further eroded the credibility of the victim and failed to introduce evidence that he could not drive for lengthy periods of time, which would have made the possibility that the events occurred as the victim described even less likely.

At the summary dismissal stage, Mr. Wilson is only required to raise an issue a genuine issue of material fact, which is when “the appellant has alleged facts in his petition that if true, would entitle him to relief.” *Charboneau v. State*, 140 Idaho 789, 792 (2004) (quoting *Stuart*, 118 Idaho at 934).

Even if he was required to do more than just allege prejudice based on the issue raised, Mr. Wilson did so in this case by making a *prima facie* showing of prejudice as evidenced by trial counsel’s failure to call the defense witnesses or submit evidence of Mr. Wilson’s physical impairments or driving restrictions.

In support of his claims, Mr. Wilson submitted several sworn affidavits and other evidence. The affidavits submitted in support of Mr. Wilson’s Petition called into question the veracity of the testimony presented at trial. For example, the State’s witness, J.K.W., initially testified that it was just she and Mr. Wilson in the car; however, the affidavit of Jered L. Wilson indicated he would have testified that he or another

¹ Mr. Wilson fully addressed this argument in his initial Appellant’s Brief and will not reiterate his arguments herein.

family member was usually in the car as Mr. Wilson had medical issues or license suspensions during this time; thus, his testimony would have impeached the credibility of J.K.W. (Trial Tr., p.342, Ls.12-17; R., pp.55-56.) As another example, J.K.W. testified that there were incidents of lewd conduct inside the house, yet the affidavit of Barbara Wilson made clear that Mr. Wilson was not living at the house during the relevant time period. (Trial Tr., p.331, L.22 – p.333, L.19; R., p.59.) This was a legitimate defense as to one of the lewd conduct charges.

The State mischaracterizes the expected testimony of Jered L. Wilson by claiming that the testimony would have shown he was in the car during “at least one” of the trips from Twin Falls to Emmett and no abuse had taken place. (Respondent’s Brief, p.10.) However, Mr. Jered L. Wilson’s affidavit states that he was in the car with Mr. Wilson and J.K.W. for trips for family visitations, and he had knowledge of other family members in the car during these trips. (R., pp.55-56.) Mr. Jered L. Wilson also had knowledge regarding Mr. Wilson’s driving restrictions and leg injury. (R., pp.55-56.) Additional information such as the foundation for his knowledge could have, and should have, been explored at an evidentiary hearing.

The State fails to recognize that the anticipated testimony of Barbara Wilson was that the acts could not have happened as J.K.W. alleged, where Mr. Wilson’s sister was the occupant of the house during the times in which the allegations against J.K.W. were alleged to have occurred and Mr. Wilson did not live there or go there with J.K.W. (R., p.59.) Additional information such as the foundation for her knowledge could have, and should have, been explored at an evidentiary hearing.

The State claims that the decision not to call any of the defense witnesses was tactical and there was no evidence of prejudice. (Respondent's Brief, pp.12-14.) However, this is not a situation where defense counsel chose not to call these four witnesses because the testimony would be duplicative of testimony already adduced by the other defense witnesses. Here, defense counsel failed to call a *single* witness in its case in chief and failed to present an opening statement as to what any information gleaned by cross-examination meant to Mr. Wilson's case. While defense counsel may have superficially inquired into some of the witnesses' topics during his cross-examination,² he did not call witnesses who would have thoroughly addressed these topics—thus, requiring the jury to speculate during cross-examination, which was not a reasonable trial strategy when the full information was available through multiple witnesses. At this juncture, failure to present any defense when witnesses were available, had relevant information, and were ready, willing, and able to testify demonstrates incompetence, not trial strategy.

While the Idaho Court of Appeals has previously held that counsel's decision not to call witnesses as part of the defense's case falls within the realm of trial tactics, see *Davis v. State*, 116 Idaho 401, 411 (Ct. App. 1989), there is no evidence that Mr. Wilson's counsel had any such intent. Further, in a credibility case such as this, a failure to call any defense witnesses when such witnesses were available and had admissible, relevant testimony that went to the heart of the accusations against Mr. Wilson, was deficient performance. Mr. Wilson has demonstrated that, by calling these witnesses at trial, their testimony would have been useful in the defense's case.

² See Trial Tr., p.285, L.19 – p.287, L.7; p.342, L.12 – p.344, L.5.

C.f. Davis, 116 Idaho at 407-08 (Ct. App. 1989) (holding, after an evidentiary hearing, that defense counsel's failure to interview prosecution witnesses did not constitute ineffective assistance of counsel or prejudice defendant where the record on appeal of the post-conviction order did not indicate that attorney would have discovered new or unique information which would have been useful in preparing the defense of Mr. Davis).

The State claims that Mr. Wilson has failed to show defense counsel's "decision to not present the evidence was based on an objective shortcoming" (Respondent's Brief, p.14.) Not only did defense counsel fail to interview and call witnesses with testimony helpful to client's case, but he presented no defense case at all. (Trial Tr., p.392, Ls.1-16.) The State claims that some part of the evidence in the affidavits submitted by Mr. Wilson was adduced on cross-examination; however, any argument to that effect is absent from defense counsel's closing remarks. There were no references to Mr. Wilson's inability to drive, the fact that he wasn't living in the house, or the various relatives who drove Mr. Wilson in the car with J.K.W. (Trial Tr., p.425, L.11 – p.438, L.22.)

The State gives short shrift to the information Mr. Wilson submitted in support of his claim that defense counsel was ineffective for failing to introduce evidence of his employment, driving, and medical records. (Respondent's Brief, pp.10-11.) However, Mr. Wilson submitted evidence that his regular driver's license, as well as his commercial driver's license, were suspended for considerable periods of time. (R., pp.65-68.) His commercial driver's license was suspended on September 15, 2006 and was not reinstated until March 20, 2007. (R., p.67.) His standard driver's license

was suspended on March 20, 2006 for a period of 180 days. (R., p.65.) His standard driver's license was reinstated effective September 16, 2006. (R., p.68.) Such information further undermines the State's case. While it was not clear if these dates in which Mr. Wilson's driver's license was restricted provided a complete alibi defense, in a case such as Mr. Wilson's where the word of one person, the victim, J.K.W., was the sole testimony and evidence the State had to prove its lewd conduct charges, any additional flaws in her version of events could erode her credibility to the jury. Such a determination would be key to a defense for these charges, particularly where there was no physical evidence corroborating the victim's statements. The district court should have thus held an evidentiary hearing where such evidence undercutting the testimony of the State's witnesses could be examined.

The State claims that the medical records Mr. Wilson submitted in support of his Petition establish only that he twice went to the emergency room complaining of ankle pain. (Respondent's Brief, p.11.) However, the medical records show that Mr. Wilson was unable to work for a period of time due to his original ankle injury, which occurred in November of 2005. (R., pp.69-73.) The record of the visit on April 16, 2006 indicates that Mr. Wilson's injury, a rip in his Achilles tendon, necessitated surgical repair by an orthopedic surgeon. (R., p.69.) On April 16, 2006, prior to surgery, he was instructed to use crutches for walking and not to bear weight on the injury area. (R., p.69.) He had already undergone surgical repair previously, on October 15, 2005, for a fracture to the area. (R., p.69.) The medical record of his visit to the emergency department on January 22, 2007, indicated that Mr. Wilson had a sprained right ankle and was again instructed to be on crutches and not to bear weight on the injury. (R., pp.70-71.)

At the hearing on the State's motion for summary dismissal, the district court provided its rationale regarding whether the testimony and evidence of Mr. Wilson's inability to drive established an issue of material fact. (3/23/15 Tr., p.11, L.19 – p.12, L.12.) The district court summarized the medical records as, "on April 16th, 2006, he was in a knee splint, used crutches, no weight bearing. And then January 22, 2007, sprained ankle, crutches till comfortable to engage in normal activities. Did I miss something?" (3/23/15 Tr., p.12, L.23 – p.13, L.2.) The district court noted that "we don't have anything that indicates for all of 2006 and all of 2007 he was medically prohibited from driving. And similarly, we don't have any driving record that indicates he was prohibited from driving all of 2006 and all of 2007." (3/23/15 Tr., p.14, Ls.5-10.)

However, in order to establish an issue of material fact, Mr. Wilson did not have to establish that he was physically unable to drive for the entire two-year time period. At the summary dismissal stage, Mr. Wilson needed to show there existed a genuine issue of material fact as to whether his counsel's deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). He sufficiently established that he was entitled to a hearing where he substantiated his allegations with multiple affidavits which set forth the witnesses' availability and a summary of their expected testimony. Mr. Wilson had to establish that a genuine issue of material fact existed as to whether his counsel was deficient and if so, whether there was a reasonable probability that, but for the deficient conduct, the result of the trial would have been different, and he did so. Defense counsel failed to call the witnesses or present evidence of Mr. Wilson's inability to drive for much of the relevant time

period. Such would have likely been sufficient to place the necessary level of doubt in the jurors' minds of Mr. Wilson's guilt.

Thus, Mr. Wilson raised multiple issues of material fact, through the verified petition and the multiple affidavits and records submitted in support of his Petition. This case exemplifies the reasons why an evidentiary hearing is necessary. It is only through an evidentiary hearing, where the witnesses could be called and questioned as to their anticipated testimony, that the district court could determine whether relief was warranted.

The district court's dismissal of all of Mr. Wilson's claims was error where Mr. Wilson actually presented *prima facie* evidence of ineffective assistance of counsel regarding these issues and demonstrated a reasonable probability that, absent counsel's errors, the result of the trial would have been different.

CONCLUSION

Mr. Wilson respectfully requests that this Court vacate the summary dismissal of his post-conviction petition with respect to the issues of whether trial counsel was ineffective for failing to investigate/agreeing to join the two cases and for failing to call witnesses and introduce evidence at trial, and remand the case to the district court for an evidentiary hearing on these issues.

DATED this 24th day of August, 2016.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of August, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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SJC/eas